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Supreme Court, U.S.
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No.: _____

In The

SUPREME COURT OF THE UNITED STATES

RICHARD CARMENA; CARL DILLON; and
JOHNNY HUGGINS, *Petitioners*,

v.

GEORGIA-PACIFIC CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

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38 pp

QUESTIONS PRESENTED

I. **May a district court grant summary judgment in favor of a party notwithstanding the existence of genuine issues of material fact?**

II. **May a district court deny a Title VII claimant urging a complaint of disparate impact the opportunity to introduce pertinent and relevant evidence due to its being a collective bargaining agreement?**

III. **May a trial court order prevent a Plaintiff from obtaining discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure despite extenuating circumstances?**

IV. **Does the test set forth by this Court in its ruling in the matter of Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) apply to cases of disparate impact?**

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceedings in the courts below:

Richard Carmena, Carl Dillon, and Johnny Huggins; *Plaintiffs-Appellants*;

Georgia-Pacific Corporation; *Defendant-Appellee.*

CORPORATION DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, by information and belief, Defendant-Appellee Georgia-Pacific Corporation is a Georgia-based corporation licensed to do and doing business in the State of Louisiana. Sup. Ct. R. 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Richard Carmena, Carl Dillon, and Johnny Huggins respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeal for the Fifth Circuit, (App. A), although not reported, is referenced in a "Table of Decisions Without Reported Opinions" as Carmena v. Georgia-Pacific Corporation, 35 Fed.Appx.387, 2002 WL 753802 (5th Cir. (La.)). The opinion of the United States District Court for the Middle District of Louisiana, (App. B.), is not, at this time, reported.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 10, 2002. (App. A). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1981 of the Civil Rights Act of 1964 provides that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§1981 further specifies that the rights protected thereby are protected by nongovernmental discrimination.

STATEMENT OF THE CASE

The Petitioners herein are three African-Americans who began their employment with Defendant Georgia-Pacific Corporation, (hereinafter referred to as "Georgia-Pacific"), at its Port Hudson, Louisiana facility in late 1988 and early 1989. At all times applicable, there was in place a collective bargaining agreement (hereinafter referred to as "CBA"), between Georgia-Pacific and Union Locals 1334 and1335, which provided that transfers and promotions at this facility were to be awarded based upon a seniority system recognizing "mill seniority," or the length of time that an individual had been employed at the aforementioned Port Hudson facility.

Traditionally, employees, the majority of whom were Caucasian, had been promoted and transferred to higher paying positions as general or converting mechanics in the maintenance department based upon this system.

Purportedly due to the 1985 installation of the newer machines, Georgia-Pacific contends that the 1996 test protocol for both Converting Mechanics and General Mechanics was adopted to accommodate the need for "more skills in electrical and instrumentation work" to maintain and repair said machines. However, this contention begs the question that, if, indeed, such higher standards were necessary, why, then, were those individuals, who were previously and then employed as both Converting Mechanics and General Mechanics, not required to upgrade their skills and to prove these skills through the passage of literacy tests and the 1996 test protocol. It should further be noted that the alleged need for heightened skills in electrical and

instrumentation work may not necessarily be satisfied by the requirement of a college-equivalent reading level. Further, it is noteworthy that it took the powers that be at Georgia-Pacific some eleven years to arrive at this epiphany.

Additionally, although Georgia-Pacific contends that both mechanics must have reading and comprehension skills that enable them to follow written instructions and read technical manuals and other documents, the Record contains no proof that the test employed by Georgia-Pacific, the Test of Adult Basic Education ("TABE"), a literacy test, has any relevance whatsoever to develop or evaluate these skills. Further, there is nothing to justify the fact that those employees who were already performing these tasks at the time of the 1996 test protocol were ever tested despite the alleged need for such enhanced skills. Likewise, those employees given the new tests have never been followed by any job or skill evaluation. There is no competent proof in the Record of a skill evaluation to support the use of, or the need for, the 1996 test protocol.

At Georgia-Pacific, the whites have been promoted and transferred through the seniority system to the higher paying jobs as general and converting mechanics in the maintenance department such that as early as 1988 and by 1995, within the maintenance department there was only one African-American out of more than 30 converting mechanics and no more than 12 African-Americans out of 143 general mechanic employees, whereas 40-45 % of the production department was/is African-American. Thus, the higher paying jobs in general and converting mechanics were/are held almost exclusively by Caucasians. This is evidence of past discrimination.

In 1996, Georgia-Pacific posted several job openings for general mechanics. Georgia-Pacific also determined that those employees, (overwhelmingly

Caucasian), who were occupying positions as converting mechanics would be given preference over employees in other positions. Additionally, what was to be later referred to as the "1996 test protocol" was implemented. This test protocol consisted of a series of tests which were designed to identify those workers who met the maximum, rather than minimum, qualifications for these positions. Further, said test results were afforded subjective interpretation. No written proof, as was required by the union book, was ever introduced to suggest that these additional tests were ever negotiated and adopted by the union.

According to the provisions of the CBA, the applicant who possessed "the minimum qualifications for the bottom job in a line of progression will be given preference based on mill seniority." Those position openings posted prior to the implementation of the so-called "1996 test protocol" set forth as follows:

> Qualified Candidates must have an advanced level of skill/ability in one of the following crafts and an intermediate level in one other of the following crafts: electrical, instrumentation, pipefitting, millwrighting, welding.
>
> Must have a two year technical degree or education equivalent and at least three (3) years experience as an electrical, instrument, or mechanical craftsman in an industrial/manufacturing setting.

Although it is undisputed that each of the Petitioners herein met the minimal requirements for these positions applicable at the time the test protocol was posted in 1996, a different scenario was presented afterward as additional criteria were posted on the

Hourly Job Posting as follows:

> These positions will be filled by a competitive selection process which will include the TABE, (Test of Adult Basic Education), written test, hands-on assessments and interviews.

I. The TABE (Test of Adult Basic Education).

According to Georgia-Pacific, the TABE requires, in part, as follows:

> Must be able to add, subtract, multiply and divide as well as handle fractions, decimals, exponents and algebraic equations.
>
> Must be able to read, comprehend, express and apply technical data; also, be able to put same on paper in a logical and understandable manner with correct and adequate content subject matter, as well as to express orally; must be able to apply in testing and calibration situations.
>
> Must achieve a 12.9 on the TABE test as a measurement of the above listed basic skills.

According to Georgia-Pacific, this test was utilized to test literacy skills; thus, it is admitted that the TABE is a literacy test. It should be noted that it has never been shown that a score of 12.9 on this test, which indicates a level of reading proficiency equal to that of a college freshman, is in any way associated with the labor skills required for the posted maintenance and

mechanic positions.

II. The Five-Part Hands-On Skills Test.

In addition to the TABE, applicants for the mechanic positions were to complete a five-part hands-on skills test. This test proved to be prejudicial to the Petitioners as well in that it was scored by individuals who were not knowledgeable in the skills tested and many individuals were allowed to cheat by observing others complete the test prior to their taking the test.

III. The Written Examination.

Along with these tests, Georgia-Pacific also implemented a sophisticated written test. This test, which also consisted of five parts, was never shown to further any business purpose or to indicate an applicant's ability or proficiency at any labor-related tasks. Additionally, being that a general mechanic performs only one of five crafts, there is no necessity that he be proficient in all five crafts. Further, no legitimate business purpose may be served by this requirement.

Furthermore, there has been no follow-up testing to determine whether the 1996 test protocol has improved job performance. There has been no comparison offered between those persons who were employed as general or converting mechanics who never took the tests with those who took the tests.

IV. The Effect of the 1996 Testing Protocol.

In 1996, twenty-nine employees took these tests, six of which were African-American, one of whom allegedly passed and the other five of whom scored dead last. Of the eight persons transferred, only one was

African American; thus, the rate of hires of the African-Americans fell far below the 4/5ths Rule.

By July 1997, Georgia-Pacific determined that eight converting mechanics would be transferred to the 1996 posted general mechanic positions, so it posted positions for the soon to be vacant converting mechanic jobs. Again, the July 1996 protocol was implemented.

Although the Plaintiffs applied for these jobs, met the minimal qualifications and had mill seniority, they were not transferred to the 1997 posted positions. Thus, all positions at the time were filled by Caucasian employees. No African-American was transferred, and, thus, by 1997 converting mechanics was exclusively white. Again, the Georgia-Pacific's 1996 test protocol failed to be validated through the 4/5ths rule.

On August 18, 1997, the July 1996 posted positions were hired; yet, it was not until December 1997, that the Plaintiffs discovered who had been hired for the July 1996 posted positions. Thus, disparate impact became evident to Plaintiffs in December 1997. Three of the persons transferred to general mechanics, Gary Pique, Joseph Dardenne and James Rambin, had less mill seniority than the Plaintiffs, and Gary Lynch, the relative, did not meet the minimal educational or skill requirement. Mr. Lynch had only two years craft experience and no training. Initially his resume was marked "no," then later remarked "yes."

On January 19, 1998, Georgia-Pacific denied the December 4, 1996, grievance filed by seven African-American. On February 23, 1998, the Plaintiffs joined in a union grievance alleging racially discriminatory hiring practices arising from the failure of Georgia Pacific to adhere to the collective bargaining agreement with regard to transfer hires. On May 29, 1998, an EEOC

complaint was filed.[1]

On July 21, 1998, Georgia-Pacific denied the February 23, 1998, union grievance on the basis that it was "extremely broad and much to [sic] vague to address with any level of specificity." On August 7, 1998, the Georgia Pacific Corporate EEO department met with the Plaintiffs regarding their complaints.

On September 22, 1998, the May 29, 1998, EEOC charge was dismissed. Less than 90 days later, on November 30, 1998, this suit was timely instituted.

In November 1999 Georgia-Pacific posted more general mechanic jobs, which posting again adopted the 1996 test protocol. Although the Plaintiffs and other African-American applied for these positions, they were prevented by the 1996 protocol from transferring. By this time, converting mechanics were exclusively white; thus, if Georgia-Pacific relied upon its recently concocted seniority system giving converting mechanics seniority over every other employee in the mill, Plaintiffs never had a chance. Seventeen persons were transferred, many of whom had been hired in 1997.

With respect to the December 1999 job posting, Georgia-Pacific admits that each of the Petitioners again met the minimal requirements; however, Huggins and Dillon were unable to pass the TABE. In addition to the TABE, a written craft test and a hands-on craft skills test were included in the criteria for this job opening, again, despite the applicable provisions of the collective

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[2] Three hundred days before May 29, 1998, was August 2, 1997. Thus, the May 29, 1998, EEOC charge was filed within three hundred days (300) of the December 1997 notice to Plaintiffs of the disparate impact. Additionally, the May 29, 1998, EEOC charge was filed within three hundred days (300) of the August 18, 1997, hiring for the July 1996 posted jobs. Thus, from either date, the EEOC complaint was timely instituted.

bargaining agreement (CBA). According to the affidavit of Mr. Cliff Andrews, offered by Georgia-Pacific, none of the three were able to pass either of these tests. Andrews further alleges that Carmena had withdrawn himself from consideration for the position prior to the decision being made. It should be noted that Andrews' affidavit is the sole source of all of these factual assertions. This begs the question of why Andrews' affidavit should be given more credibility than those of the Plaintiffs-Appellants and their witnesses from whose testimony indicates that Georgia-Pacific "bent" the rules for non-African-American applicants, but applied them strictly when considering African-Americans, such as Carmena, Dillon, and Huggins.

In November 2000, Georgia-Pacific posted more converting mechanic positions. This time one African-American was transferred and one was hired off the street. Whites were transferred and hired off the street for these converting mechanic jobs. Again, Plaintiffs along with other African-American applied, but were denied.

In February 2001, Georgia-Pacific posted general mechanic positions. Again, no African-Americans were allowed to transfer to these positions, and whites filled them, many of whom were the white off-the-street hires from the November 2000 posting. Again, Georgia-Pacific failed to apply mill seniority.

The ever present question remained that, if the 1996 were not a pretext to exclude blacks, then why were the whites who were already in maintenance not required to take and pass the tests. The end result of the 1996 test protocol, whether Georgia-Pacific concedes that this was the intent or not, was that African-Americans suffered a disparate impact from their non-minority counterparts. The lower courts fell into error in applying the test set forth in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98

S.Ct. 2018, 56 L.Ed.2d 611 (1978).

REASON FOR GRANTING THE PETITION

The trial and appellate courts erred in failing to analyze this matter as a disparate impact case and in applying the test set forth in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a wrongful termination suit, as a rigid protocol in a case concerning an employer's failure to promote. Additional error was committed when the trial court found that the minimal job requirements were set by the 1996 test protocol, rather than by the CBA and that the NLRB preempts Plaintiffs' efforts to offer the CBA as evidence of the job requirements and further, that all of the Plaintiffs' evidence was "self-serving," whereas Georgia-Pacific's evidence, (two affidavits), was credible. The Fifth Circuit furthered the trial court's error in affirming the trial court's granting of summary judgment.

I. The lower courts erred in granting Georgia-Pacific's motion for summary judgment despite the presence of genuine issues of material fact.

It is well established that courts of appeal review district courts' granting of summary judgment *de novo* and apply the same standard as would a district court. Evans v. City of Bishop, 238 F.3d 586 (5th Cir. 12/11/00) (citing Walker v. Thompson, 214 F.3d 615 (5th Cir. 6/13/00)). Further, Rule 56 of the Federal Rules of Civil Procedure provides that, if the party moving for summary judgment meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the nonmovant to produce evidence or designate specific facts showing the

existence of genuine issues for trial. Evans, supra, (citing Allen v. Rapides Parish School Board, 204 F.3d 619 (5th Cir. 3/2/00)). Additionally, any doubts are to be resolved in favor of the nonmoving party; any reasonable inferences must be drawn in favor of that party. Evans, supra, (citing Burch v. City of Nacogdoches, 174 F.3d 615 (5th Cir. 5/10/99)), also see Boston Old Colony Ins. Co. v. Tiner Associates, Inc., --- F.3d ---- (5th Cir. 4/9/02).

Further focusing on matters involving employment discrimination, this Court, in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (6/12/00), reasoned that once a plaintiff has established a prima facia case, the burden shifts to the defendant to produce evidence that the plaintiff was rejected, or that someone else was preferred, for a legitimate, non-discriminatory reason. This burden is one of production, not persuasion; it can involve no credibility assessment. Reeves, supra, 530 U.S. at 142, 120 S.Ct. at 2106, (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (6/25/93)). From this point, the plaintiffs bear the burden of demonstrating that the defendants' assertions are pretextual; thus the ultimate burden of persuasion remains with the plaintiff. See Hall v. Gillman, Inc., 81 F.3d 35 (5th Cir. 4/18/96).

In this matter, the Plaintiffs have, as required, established a *prima facia* case of race-based discrimination against the Defendant, Georgia-Pacific. Thus, the burden shifted to Georgia-Pacific to produce evidence to rebut the Plaintiffs' case. The trial court noted:

> Although this court is quite concerned by the indication that Georgia Pacific has increased the requirements for the lowest level mechanic position to such a point

> that not one African American who applied could meet them, these plaintiffs have not provided to the court the basic facts to allow them to proceed.

Georgia-Pacific contends that the tests administered to these employees were required to qualify for higher-level, skilled positions. Genuine issues of material fact were raised with respect to whether the administration of these tests were legitimate or pretextual to the disparate treatment suffered by the Plaintiffs, and, as previously stated, it is well established that any doubt must be resolved in favor of the nonmoving party.

Plaintiffs have consistently maintained that the TABE literacy test and other tests within the 1996 test protocols were not part of the minimal qualifications for the posted position. The CBA is proof positive that the only additional qualifications beyond minimal education and craft experience is seniority. Georgia-Pacific admits that Plaintiffs met these minimal qualifications. Plaintiffs had that seniority. Plaintiffs were denied the posted positions based on trumped up, artificial, and superfluous job qualifications that have never been shown to advance any legitimate Georgia-Pacific business purpose. Moreover, it was a clear and intentional violation of the CBA to inject the 1996 test protocol into the job posting. In view of the disparate impact effected by the 1996 test protocol, Georgia-Pacific's failure to adhere to the CBA constituted, not only an intentional violation of contract, but is hand-in-hand direct evidence of intentional racial discrimination. Georgia-Pacific cannot and has not denied that it knew or should have known of the disparate impact occasioned by the 1996 test protocol.

The statistics submitted by the Plaintiffs prove disparate impact. Thus, summary judgment was

precluded as a matter of law.

II. The lower courts failed to properly address the issue of whether the collective bargaining agreement could be used as evidence.

The Collective Bargaining Agreement (CBA) is a contract that controls terms of employment between the Plaintiff labor union members and their employer, Georgia-Pacific. Apparently the straight seniority requirement in the CBA allowed non-African-American (white) employees to hold the positions of influence and higher paying jobs and was, thus, effective in achieving the discriminatory end intended by this majority faction. After nearly twenty years, however, as the African-American faction gained seniority in this system, the whites were forced to employ further means to sustain their racially-cleansed work environment. According to the District Court, Plaintiffs have not offered sufficient evidence to support a finding of racial animus or intent to discriminate.

While it is a rare case where the smoking gun may be located and presented as direct evidence of intent, INTENT may be proven through circumstantial evidence. Proving a case through circumstantial evidence requires a weighing and balancing as well as credibility determinations. Whether a party has proven his/her case through circumstantial evidence is a finding better left to a jury. Here, this case is riddled with disputed issues of fact. The trial court improperly made a credibility determination that Georgia-Pacific's two affidavits offered as its sole evidence were entitled to more credibility than an expert opinion, the testimony of the three plaintiffs, affidavits of numerous co-workers and documents of which the authenticity has never been questioned. The Trial Court improperly usurped the role of the jury. This case should be heard by a jury

whose job it is to weigh facts and make credibility determinations.

Despite the fact that the Plaintiffs were saddled with the burden of exposing the pretextual motives which underlay Georgia-Pacific's purported interest in administering said tests, and the fact that the best evidence of the requirements for such positions was detailed in the applicable CBA, the Plaintiffs were denied the opportunity to present this document; thus, by this denial, the Plaintiffs were unfairly torpedoed in their efforts to meet their burden.

In justifying this denial, the court of appeal, during oral argument, stated that matters concerning the CBA are preempted and are subject to the jurisdiction of the National Labor Relations Board, (NLRB). The Supreme Court, in the matter of Allis-Chalmers Corp. V. Lueck, 105 S.Ct. 1904, 85 L.Ed.2d 206,(1/16/85) reasoned as follows:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective- bargaining

> agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

It should further be noted that the Fifth Circuit had acknowledged the Allis-Chalmers decision in more recent years in the matter of Branson v. Greyhound Lines, Inc., Amalgamated Council Retirement and Disability Plan, 126 F.3d 747 (5th Cir. 10/30/97). Therein, the Fifth Circuit noted that, to the extent that a defense raised would implicate a collective-bargaining agreement at all, it would do so only tangentially, and, thus, would not preempt the underlying state claim. Branson, supra, at 754 (citing Allis-Chalmers, supra, (not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement is preempted by §301)).

It should then be noted that the general rule is that one panel may not overrule another. Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 10/13/81), Broussard v. Southern Pacific Trans. Co., 665 F.2d 1387 (5th Cir. 1/25/82), Hogue v. Johnson, 131 F.3d 466 (5th Cir. 12/12/97), *writ denied*, 523 U.S. 1014, 118 S.Ct. 1297, 140 L.Ed.2d 334 (1998), and Doe v. Santa Fe Independent School District, 168 F.3d 806 (5th Cir. 2/26/99). The instant ruling by the Fifth Circuit creates a lack of continuity in its opinions. Thus, clarification of this issue by this Court is needed.

Addressing the factual basis of this argument in the context Allis-Chalmers, supra, to suggest that the reliance upon applicable provisions of a CBA to establish

job requirements is preempted is inappropriate. Further, the prohibition of this evidence irreparably prejudiced the Plaintiffs' ability to carry the statutorily established burden.

The CBA's job qualifications under contract were followed for decades up and until 1996. In addition, presently in most parts of Georgia-Pacific's Port Hudson facility, the CBA is still followed to the letter. Georgia-Pacific has never shown why those persons in the production department who, day in and day out, operate the Georgia-Pacific equipment may be hired in accord with the CBA based on minimal requirements and seniority; yet, for those persons who maintain the equipment (the higher paying jobs) should be hired on the non-CBA basis of passage of a literacy test. In addition, while the whites had seniority, Georgia-Pacific adhered to the CBA. When the African-Americans began obtaining seniority, Georgia-Pacific unilaterally breached the CBA. This is circumstantial evidence of intentional discrimination. Moreover, if the 1996 test protocol is truly indicative of job performance (which is denied), why was the 1996 protocol never used to evaluate the job performance of the current maintenance employees?

Georgia-Pacific, in its brief to the Fifth Circuit, stated, "[t]he law simply does not require Georgia-Pacific to pass up qualified persons and hire unqualified persons, based solely on race or seniority or any other criteria which Plaintiffs would have Georgia-Pacific use." Notably, Georgia-Pacific freely entered into the CBA with the Plaintiff workers. If the CBA had such an untoward effect (which is denied), the law of contracts <u>does</u> require Georgia-Pacific to pass up qualified persons and hire unqualified persons.

While this conclusion is absurd, it is significant that Georgia-Pacific has never shown that the effect of an adherence to the CBA resulted in the hiring of unqualified persons. Thus, Georgia-Pacific has not

shown just cause, or any legitimate business purpose, to support its failure to adhere to the CBA.

III. The lower courts inappropriately ruled that discovery was time-barred due to the fact that the Plaintiffs' previous attorney did not initiate discovery.

When the Plaintiffs urged their complaint that the trial court had erred by denying them the opportunity to discover information necessary to defeat Georgia-Pacific's motion for summary judgment, the trial court indicated that, being that the attorney who initially represented the Plaintiffs prior to the undersigned's enrolling in the matter, the Plaintiffs were not entitled to extend the time for discovery in this matter. It should be noted that no trial date had been set in this case; thus, there was no issue of any undue delay which would have been occasioned by extending discovery.

Until the undersigned counsel enrolled as counsel for Plaintiffs, Plaintiffs were, for all purposes, before the trial court in proper person. The previous attorneys took not one deposition and failed to follow-up on their document requests. The appellate court should have considered that fact in determining whether the district court abused its discretion in refusing to allow for a very limited additional discovery. As such, the Plaintiffs were doomed from the beginning in their desperate efforts to challenge the motion for summary judgment.

There was no dalliance on the part of the undersigned Plaintiffs' counsel, who, immediately amended the complaint and sought to secure deposition, discovery, and to subpoena records from a third party and to obtain the 30 (b)(6) of GP. The Magistrate refused any additional discovery and offered to sanction the

undersigned for attempting to obtain any additional discovery.

The purpose of Rule 56(f) is to provide nonmovants with a much needed tool to keep open the doors of discovery in order to adequately combat a summary judgment motion. Wichita Falls Office Associates v. Banc One Corp., 978 F.2d 915 (5th Cir. 12/4/92). Such "continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course" unless "the nonmoving party has not diligently pursued discovery of the evidence." International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 8/29/91), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1/21/92).

Obviously, said Plaintiffs have been prejudiced by previous counsel's failure to act; however, such negligence of that counsel should not, in any manner avoidable, serve to further prejudice the laymen Plaintiffs. Certainly to expect *pro sé* litigants to act with that level of legal prowess expected of members of the bar would be unjust and would invite rampant abuse from unethical practitioners. Thus, the trial court should have allowed the Plaintiffs, through their newly enrolled counsel, adequate time to discover such evidence as would be necessary to challenge Georgia-Pacific's summary judgment motion.

IV. The lower courts erred in applying the Monell test to this case.

As a result of the trial court's preventing the Plaintiffs from introducing evidence of the CBD and furthering the discovery process in accordance with Rule 56, the Plaintiffs were unable to show that Georgia-Pacific's scheme to exclude African-Americans from the more desirable jobs served no legitimate business purpose. Had Plaintiffs been allowed to introduce such

evidence as would inarguably have illustrated Georgia-Pacific's purpose, the trial court would have been left with no alternative but to address this matter as a disparate impact case.

Disparate impact is a basis for relief under Title VII if the practice in question is not founded on "business necessity," or lacks "a manifest relationship to the employment in question." Regents of University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), (citing Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1970)). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803, 805-806, 93 S.Ct. 1817, 1824, 1825, 1826, 36 L.Ed.2d 668 (1973).

In the matter of Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), this Court was faced with a situation not unlike the present in which African-American employees of a state agency claimed that a written promotion examination discriminated against them on the basis of their race in violation of Title VII of the Civil Rights Act of 1964. In that matter, as in this, the trial court dismissed their action for their allegedly having failed to establish a *prima facie* case. Upon granting certiorari, this Court held that an employer's acts of racial discrimination in promotions, effected by an examination having a disparate impact, rendered said employer liable for racial discrimination suffered by employees barred from promotion, even if the "bottom line" of the promotional process was an appropriate racial balance. Connecticut v. Teal, supra.

In this matter, Georgia-Pacific cannot, and does not appear to have made any attempt to, suggest that its motivation in implementing the 1996 test protocol had anything to do with balancing the racial composition of the employees. Therefore, Georgia-Pacific should certainly be liable to the Plaintiffs herein who were

barred from promotion as a result of the 1996 test protocol.

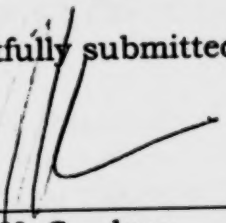
Had Plaintiffs been allowed to introduce the CBA and to further their discovery, such evidence sufficient to prove that no legitimate business purpose was served by the 1996 test protocol would have been gleaned. From that point, the trial court would have had to address this matter as one of a clear disparate impact occasioned by the divisive implementation of a discrimination-perpetuating scheme thinly veiled in the 1996 testing protocol.

Such discriminatory tools serve no purpose but to exclude otherwise qualified individuals from obtaining better jobs. Therefore, those unfortunate enough to fall prey to these tactics are entitled to recovery under the provisions of Title VII.

CONCLUSION

For the reasons set forth herein, the foregoing Petition for Certiorari should be granted.

Respectfully submitted;



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APPENDIX

A. Opinion of the Fifth Circuit Court of Appeals

B. Judgment of the District Court for the Middle District of Louisiana

C. Ruling of Motions for Summary Judgment, for Reconsideration and for Review of Magistrate's Discovery Rulings of the District Court for the Middle District of Louisiana

U.S. COURT OF APPEALS
FILED
APR 10 2002
CHARLES R. FULBRUGE III
CLERK

UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30883

RICHARD CARMENA, CARL DILLON, JOHNNY HUGGINS,
Plaintiffs-Appellants,

versus

GEORGIA-PACIFIC CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
(99-CV-5)

Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

PER CURIAM:*

This action arises out of claimed race-based discrimination by Georgia-Pacific Corporation, concerning Appellants not being selected for promotion

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. 47.5.4

To higher-level, skilled jobs. Summary judgment was awarded Georgia-Pacific. See Carmena v. Georgia Pacific Corp., No. 99-05-D (M.D. La. 26 June 2000); Fed. R. Civ. P. 56.

No statutory authority need be cited for the fact that review of a summary judgment is *de novo*, with such judgment being proper if there are no issues of material fact and if the movant (Georgia-Pacific) is entitled to a judgment as a matter of law. Along this line, the district court did not abuse its discretion for use in opposing summary judgment.

For purposes of our review, we assume *arguendo* that all Appellants' claims were properly raised in district court and that none are procedurally barred. In any event, as discussed in part by the district court, we hold that the claims fail under theories of disparate treatment and disparate impact. In short, summary judgment was proper.

AFFIRMED

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U.S. DISTRICT COURT
MIDDLE DIST. OF LA.

01 JUN 26 AM 10:20

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by DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

RICHARD CARMENA,
CARL DILLON and JOHNNY HUGGINS

CIVIL ACTION

VERSUS

NO. 99-05-D

GEORGIA-PACIFIC CORPORATION

JUDGMENT

For the written reasons assigned this date;

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendant, Georgia-Pacific Corporation, and against Plaintiffs, Richard Carmena, Carl Dillon and Johnny Huggins. This action is hereby DISMISSED in its entirety.

Baton Rouge Rouge, Louisiana, this 25th day of June, 2001.

s/ James J. Brady
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA

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DATE _____
NOTICE MAILED TO
DATE 6/26/01 BY BW

FILED
U.S. DISTRICT COURT
MIDDLE DIST. OF LA.

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by DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

RICHARD CARMENA,
CARL DILLON and JOHNNY HUGGINS

CIVIL ACTION

VERSUS

NO. 99-05-D

GEORGIA-PACIFIC CORPORATION

RULING ON MOTIONS FOR SUMMARY JUDGMENT, FOR RECONSIDERATION AND FOR REVIEW OF MAGISTRATE'S DISCOVERY RULINGS

This matter is before the court on motions by defendant Georgia-Pacific Corporation ("Georgia-Pacific") for summary judgment and for reconsideration of this court's denial of their motions for summary judgment on procedural grounds granting plaintiffs' leave to amend the petition as well as by the plaintiffs, for review of Magistrate Reidlinger's discovery rulings issued February 23, 2001 and March 13, 2001. The motions are opposed. Jurisdiction is based on **28 U.S.C. § 1331**, there is no need for oral argument.

Plaintiffs, Richard Carmena, Carl Dillon and Johnny Huggins bring this action against their employer, Georgia-Pacific Corporation, claiming that they were discriminated against because of their race in violation of the Civil Rights Act of 1964 ("Title VII"). Each also makes a claim for race discrimination under **42 U.S.C. § 1981.**

Defendant originally brought a motion for summary judgment on procedural grounds only, in accordance with the court's scheduling order. That motion was denied by the court and subsequently they filed the instant motion for summary judgment on substantive grounds, again in accordance with the scheduling order. Defendants have also requested reconsideration of the ruling on procedural grounds. Since this matter is disposable on substantive grounds, the two motions for reconsideration on procedural grounds need not be addressed. Further, the motion to strike will be denied.

As to the motion for summary judgment on substantive grounds, the shifting burdens of production, and the ultimate burden of proof, in a Title VII claim are well established. First the plaintiff must establish a prima facie case of discrimination. Second, the defendant must articulate some legitimate, non-discriminatory reason for the challenged employment action. Third, the plaintiff must then prove by a preponderance of evidence that the defendant intentionally discriminated. **Russell v. McKinney Hospital Venture**, 2000 WL 1785541 (5th Cir. 2000). Clearly the plaintiff's burden of proof is heavy and it is the same for the claims under § 1981.

In this case, the defendant makes several arguments that plaintiffs' case should be dismissed. The most convincing of which is that plaintiffs cannot even meet their initial burden of establishing a prima facie case of discrimination. The well settled principles for establishing a prima facie case of discrimination were set forth by the Supreme Court beginning with **McConnell Souglas Corp. v. Green, 411 U.S. 792 (1973).** That case held that a Title VII plaintiff bore the initial burden of proving his prima facie case of discrimination by a preponderance of the evidence. The prima facie case consists of a showing that (1) plaintiff is a member of a protected class, (2) plaintiff sought and was qualified for an available employment position, (3)

plaintiff was rejected for that position and (4) the employer continued to seek applicants with plaintiff's qualifications. **Id. at 801-803.**

Defendant argues that the plaintiffs were not qualified for the positions at issue and that as a result that they cannot meet their initial burden of proof, necessitating that their case be dismissed. A review of the evidence before the court in light of the standards for summary judgment shows that the plaintiffs have failed to put forth admissible evidence that they were qualified for the positions they sought.

Summary judgment is appropriate if the moving party establishes that there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. **F.R.C.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).** In response, plaintiffs must present contradictory evidence on that issue. Conclusory claims and subjective beliefs are insufficient to create a material issue of fact for summary judgment. **Grimes v. Texas Dep't of Mental Health, 102 F.3d 137, 139 (5th Cir. 1996).**

In its motion for summary judgment, defendant has brought forth affidavit and documentary evidence that the positions at issue required certain minimum qualifications that the plaintiffs did not have. In opposition, plaintiffs offer their own opinion that they were qualified, hearsay evidence of qualifications previously utilized and conclusory statements that the tests were not relevant to the job. They argue that the qualifications set forth by Georgia Pacific are not necessary to the job, yet there is no admissible evidence whatsoever that supports this contention, Without this basic element of proof, plaintiffs cannot move forward. Although this court is quite concerned by the indication that Georgia Pacific has increased the requirements for the lowest level mechanic position to such a point that not one African American who applied could meet them, these plaintiffs have not provided to the court the basic

facts to allow them to proceed. It is clear on the record that there is not genuine dispute of material fact with regard to the qualification issue and as such, defendant is entitled as a matter of law, to summary judgment.

Accordingly, defendant's motions for reconsideration (docs. 76 & 78) are DENIED as MOOT, the motion to strike (doc. 142 is hereby DENIED and the motion for summary judgment (doc. 112) is hereby GRANTED. Plaintiffs claims shall be dismissed in their entirety. Further all motions for leave to file additional briefs (docs. 141, 145, 151 & 152) are GRANTED. Plaintiffs' motion for review of the magistrate's discovery rulings (doc. 123) and motion to amend pretrial order (doc. 143) are hereby DENIED as MOOT.

Baton Rouge, Louisiana, this 25th day of June, 2001.

s/ James J. Brady
JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA

(2)

Supreme Court, U.S.
FILED

02 298 AUG - 7 2002

OFFICE OF THE CLERK

No.: _____

In The

SUPREME COURT OF THE UNITED STATES

RICHARD CARMENA; CARL DILLON; and
JOHNNY HUGGINS, *Petitioners*,

v.

GEORGIA-PACIFIC CORPORATION, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Supplemental Appendix to Petition for Writ of Certiorari

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4 pp

APPENDIX D

D. Fifth Circuit Court of Appeal's ruling on Petition for Rehearing En Banc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30883

U.S. COURT OF APPEALS
FILED
MAY 9, 2002
CHARLES R. FULBRUGE III
CLERK

RICHARD CARMENA; CARL DILLON; JOHNNY HUGGINS
Plaintiffs-Appellants

v.

GEORGIA-PACIFIC CORPORATION
Defendant-Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

---

ON PETITION FOR REHEARING EN BANC

(Opinion 4/10/02, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor

judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing is DENIED.

ENTERED FOR THE COURT:

s/Rhesa H. Barksdale
United States Circuit Judge

REHG-6a

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

Supreme Court, U.S.
FILED
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No. 02-298

IN THE

Supreme Court of the United States

RICHARD CARMENA, CARL DILLON,
and JOHNNY HUGGINS,

Petitioners,

v.

GEORGIA-PACIFIC CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners offered sufficient evidence to support their claims of disparate treatment.

2. Whether Petitioners' claims of breach of the collective bargaining agreement are preempted by the Labor Management Relations Act, and, if not, whether Petitioners offered sufficient evidence that Georgia-Pacific breached the collective bargaining agreement by failing to promote Petitioners.

3. Whether the district court properly exercised its discretion by refusing to reopen discovery.

4. Whether Petitioners failed to submit any evidence which would support a claim of disparate impact.

ADDITIONAL QUESTIONS PRESENTED

5. Whether Petitioners' claims of discriminatory promotions with respect to the July 1996 posting are time barred under Title VII and 42 U.S.C. § 1981.

6. Whether Petitioners' Title VII claims regarding the April 1997 converting mechanic positions and December 1999 general mechanic positions are barred due to Petitioners' failure to exhaust administrative remedies.

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Richard Carmena, Carl Dillon and Johnny Huggins were Plaintiffs and Petitioners in the proceedings below.

Respondent Georgia-Pacific Corporation was Defendant and Appellee in the proceedings below.

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states as follows:

Georgia-Pacific Corporation is incorporated in the State of Georgia. Georgia-Pacific Corporation has no parent company and no publicly held company owns 10 percent or more of its stock.

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Other Authority:

Employment Discrimination Law 3rd Ed., B. Lindemann and P. Grossman 23, 25

28 C.F.R. § 1601-12(b) (1997) 28

The Petition for a Writ of Certiorari should be denied because the decision below represents a routine application of settled employment discrimination law and does not present any issue of general importance. Moreover, the Fifth Circuit Court of Appeals' affirmation of the District Court's summary judgment may be upheld on numerous alternative grounds, which neither conflict with the decisions of any other Circuit nor raise any issues that implicate the supervisory power of this Court.

INTRODUCTION

Petitioners Richard Carmena, Carl Dillon and Johnny Huggins are currently employed in the Production Department of Georgia-Pacific's Port Hudson, Louisiana Pulp and Paper Mill. Petitioners filed their Complaint under Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981. They allege that due to their race (African-American), Georgia-Pacific intentionally discriminated against each of them by failing to offer them three (3) specific jobs they applied for in the Mill's Maintenance Department. These three jobs were: (1) positions as General Mechanics posted in July 1996; (2) positions as Converting Mechanics posted in April 1997; and (3) positions as General Mechanics posted in December 1999.

There are numerous alternative reasons why summary judgment against Petitioners' claims was properly entered and affirmed. All are supported by fundamental tenants of employment law. First, Petitioners did not meet their burden of establishing a *prima facie* case of discrimination, as set forth in this Court's opinion in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Indeed, undisputed record evidence demonstrates that Petitioners were not qualified for any of the three positions they sought since they each failed objective tests required as part of the application process. Likewise, the Petition should also be denied because Petitioners did not offer any evidence

to rebut Georgia-Pacific's articulated legitimate, non-discriminatory reasons (their failure to pass the required tests) for not offering Petitioners the positions at issue.

Petitioners' real complaint in this matter has been that Georgia-Pacific should have awarded them the disputed mechanics positions according to strict, Mill-wide seniority, and Georgia-Pacific's failure to do so breached the Collective Bargaining Agreement (CBA). Even assuming Georgia-Pacific breached the CBA (it did not), Petitioners' claims are also preempted by the Labor Management Relations Act, 29 U.S.C. § 141 *et seq*. Further, Petitioners' argument that they were not allowed adequate discovery is belied by the record evidence and premised upon an abuse of discretion argument entirely unworthy of this Court's review. In any event, Petitioners' assertion that this action should have been analyzed under a disparate impact theory does nothing to support the Petition, as the record is void of any evidence of disparate impact. Simply stated, Petitioners failed to submit evidence, of any kind, which could establish that Georgia-Pacific intentionally discriminated against them on the basis of their race.

Finally, Petitioners' claims also fail pursuant to well-established procedural bars, which Petitioners fail to even address. Because the undisputed record evidence indicates that Petitioners knew more than a year before they filed this action and more than 300 days before filing their EEOC charges that they had not been awarded the positions posted in July 1996, their claims with regard to the July 1996 posting are time barred under both Title VII and 42 U.S.C. § 1981. Likewise, Petitioners' Title VII claims are barred for failure to exhaust administrative remedies because (1) they never filed an EEOC Charge with regard to their claims of discrimination involving the April 1997 Converting Mechanic positions, and (2) they did not received Notices of Right to Sue from the EEOC with regard to their claims of discrimination involving the December 1999 General Mechanic positions.

Petitioners' claims are barred by numerous alternative legal principles which are neither novel, complex nor disputed, their Petition for Writ of Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE[1]

Georgia-Pacific Corporation ("Georgia-Pacific") is a manufacturer and distributor of forest products — including paper and building products. In the mid 1980's, Georgia-Pacific began modernizing its Port Hudson Pulp and Paper Mill ("the Mill") near Baton Rouge, Louisiana, where Petitioners are currently employed. (Aff. of Cliff Andrews ¶ 3, R. at 862.) In doing so, it updated its processing equipment and added a new Fine Paper Machine as well as a Fine Paper Converting Operation. (*Id.*) The modernization of equipment continued into the 1990's, and many of the new machines operated on a computer-based control system that allowed for computerized control of the operation of the equipment. (*Id.*) This new equipment was far more technical and computerized than the equipment previously used. (*Id.*) The Mill was, therefore, required to upgrade the qualifications and skills of mechanics hired to maintain and repair this equipment. (Andrews Aff. ¶ 6, R. at 858.)

A. *Updating General Mechanics' and Converting Mechanics' Qualifications*

There are two different groups of employees responsible for maintaining and repairing the pulp and paper production equipment at the Mill. (Andrews Aff. ¶ 4, R. at 860.) The first, known as Converting Mechanics, generally work on basic production equipment, such as "sheeters," which are machines that cut paper from large industrial rolls into

1. The Statement of Facts set forth in the Petition is unsupported by any record citation and seriously misrepresents the record. Accordingly, Georgia-Pacific provides this Counterstatement, setting forth the facts and record citations pertinent to the Fifth Circuit's affirmation of the district court's summary judgment decision.

their final product size. (*Id.*) Converting Mechanics perform preventative maintenance on these and other production machines, trouble-shoot the equipment, replace worn out or broken parts, make adjustments to the machines' performance and repair the machines when they malfunction or break down. (*Id.*) Because the newer machines that were installed in the Mill had computer-controlled drives and hydraulic systems, the Converting Mechanics needed more skills in electrical and instrumentation work to maintain and repair these machines, in addition to skills in mechanical crafts such as pipefitting, millwrighting and welding. (*Id.*)

The other group of employees responsible for maintaining and repairing the Mill's production equipment are the General Mechanics, who generally work with larger and more complex machinery than those serviced by Converting Mechanics. (Andrews Aff. ¶ 5, R. at 859.) The General Mechanic position is considered a higher level job classification than the Converting Mechanic position, and General Mechanics receive a higher rate of hourly pay due to the more skilled nature of the position. (*Id.*) The General Mechanics' equipment is generally more dangerous because they utilize higher temperature, higher pressure, and various chemicals in producing pulp and paper. (*Id.*) Just like Converting Mechanics, General Mechanics perform preventative maintenance on the production machines, trouble-shoot the equipment, replace worn out or broken parts, make adjustments to the machines' performance and repair the machines when they malfunction or break down. (*Id.*) Many of the maintenance and repair needs of the equipment serviced by General Mechanics are not visually identifiable by mere inspection. Instead, the maintenance and repair issues involve chemical or electrical processes that General Mechanics have to anticipate, prevent, diagnose and fix when they occur. (*Id.*) The modern machines installed in the Mill that the General Mechanics service also have computer-controlled drives and sophisticated technical

systems. (*Id.*) Thus, just like Converting Mechanics, the General Mechanics needed more skills in electrical and instrumentation work to maintain and repair these machines, in addition to skills in mechanical crafts such as pipefitting, millwrighting and welding. (*Id.*) Performing this work on these new machines required even higher levels of skills in electrical and instrumentation work than was required of Converting Mechanics. (*Id.*)

After the modernization of the equipment in the Mill had been accomplished, an evaluation of the skills needed in General Mechanics and Converting Mechanics showed that these employees' work skills could best be classified according to two categories: (1) basic education requirements (reading, writing, and mathematics), and (2) technical craft knowledge combined with hands-on craft skills. (Andrews Aff. ¶ 7, R. at 857.) To test basic education requirements, Georgia-Pacific decided to utilize the Test of Adult Basic Education ("TABE"). (*Id.*) This is a standardized test used for preparation by individuals seeking to obtain their high school general equivalency degree (GED). (*Id.*) Individuals would need to receive a passing score on the test of 12.9, which represents an equivalent knowledge and educational level of a high school graduate. (*Id.*) The test was administered by The State of Louisiana's Christa McAuliffe Adult Education Center ("the Center") in Baton Rouge, not by Georgia-Pacific. (*Id.*) The Center would send Georgia-Pacific a list of all employees who took the TABE and whether they received a passing score or not. (*Id.*) The Center also provided adult education courses for employees who failed the test but wanted additional education to retake the test. (*Id.*)

With regard to the technical craft knowledge and hands-on craft skills, existing highly skilled mechanic employees at the Mill were selected by their Union Local, at Georgia-Pacific's request, to identify what craft skills and what levels of proficiency in these skills were necessary to perform the

General Mechanic and Converting Mechanic jobs. (Andrews Aff. ¶ 9, R. at 856.) With this information, Georgia-Pacific worked with a technical consulting company and a craft training school to develop a written craft test and a hands-on craft skills test to identify individuals who possessed the requisite craft skills in the electrical, instrumentation, pipefitting, millwrighting and welding crafts to perform the General and Converting Mechanic jobs. (*Id.*)

B. ***The July 1996 Posting For General Mechanic Positions***

Due to retirements and terminations of General Mechanics at the Mill during the mid-1990's, by 1996 the Mill needed additional General Mechanics for its Maintenance Department. (Andrews Aff. ¶ 7, R. at 857.) Therefore, on July 12, 1996, an Hourly Job Posting form was posted at the Mill seeking applicants for General Mechanic positions. (Andrews Aff. ¶ 10; R. at 856-857; Aff. of Fred Woods ¶ 4, R. at 839; Statement of Uncontested Material Facts filed May 15, 2000 (hereinafter "SUMF"), ¶¶ 7-8, R. at 884; Dep. of Richard Carmena at 241, R. at 808; Dep. of Carl Dillon at 62, 112, R. at 803, 793; Dep. of Johnny Huggins (Vol. II) at 176, R. at 775; Exhibit 3 of Petitioners' Combined Deposition Exhibits (hereinafter "Petitioners Dep. Ex."), R. at 760-767.) As set forth in the July 1996 job posting, the position of General Mechanic required: (1) certain minimal levels of background craft education and craft work experience; (2) a score of at least 12.9 on the Test of Adult Basic Education (TABE); and (3) sufficient scores on the written craft test and hands-on craft test to prove that the applicant possessed appropriate knowledge and skill levels in the skilled crafts necessary to perform the General Mechanic job, including electrical and instrumentation skills, and the mechanical skills of pipefitting, millwrighting, and welding. (Andrews Aff. ¶ 10, R. at 856-857; Woods Aff. ¶ 4, R. at 839; Petitioners Dep. Ex. 3, R. at 760-767.) Petitioners Richard Carmena, Carl Dillon, and Johnny Huggins, who were all employees in the

Mill's Production Department, were three (3) of the seventy-one (71) individuals who applied for the posted July 1996 General Mechanic positions by signing the Job Posting form. (Andrews Aff. ¶ 11, R. at 856; Woods Aff. ¶ 5, R. at 839; Carmena Dep. 235, R. at 811; Dillon Dep. 229, R. at 788; Huggins Dep. (Vol. II) 219, R. at 773; Petitioners' Dep. Ex. 12, R. at 747-750; SUMF ¶ 10, R. at 884.)

The selection process for filling the July 1996 General Mechanic positions proceeded in steps. (Andrews Aff. ¶ 12, R. at 856; Woods Aff. ¶ 6, R. at 839.) First, Georgia-Pacific screened all of the applications to determine which applicants had the required preliminary education and experience as set forth in the job posting. (*Id.*) All three of the Petitioners satisfied the initial, minimal education and experience requirements of the General Mechanic positions, and they proceeded to the testing process. (*Id.*)

Petitioner Carmena did not score a 12.9 on his first time taking the TABE. (Andrews Aff. ¶ 13, R. at 856; Woods Aff. ¶ 7, R. at 838.) However, Carmena was permitted to retake the test after attending refresher adult education classes, and he passed the TABE on his second try, in time to be considered for the July 1996 General Mechanic positions. (*Id.*) In contrast, neither Petitioners Huggins nor Dillon passed the TABE, and neither of them attempted to retake the test — which they were permitted to do — to try to qualify for the July 12, 1996 General Mechanic positions, even though they knew they had to pass the TABE to qualify for the jobs. (Andrews Aff. ¶ 13, R. at 856; Woods Aff. ¶ 7, R. at 838; SUMF ¶¶ 12-13, R. at 883; Dillon Dep. 65-67, 138, 221-223, R. at 799-801, 792, 788-790; Huggins Dep. (Vol. I) 195-98 and (Vol. II) 140-47, R. at 782, 776-777.) None of the three Petitioners received the minimum passing scores on the written craft test or the hands-on craft skills test. Andrews Aff. ¶ 14, R. at 855; Woods Aff. ¶ 8, R. at 837.) Thus, Petitioners were not qualified for the General Mechanic positions. (*Id.*) Accordingly, when Georgia-Pacific completed

its selection process for the July 1996 General Mechanic positions, the available positions were offered to qualified applicants who had passed the TABE, the written skills test, and the hands-on test. (*Id.*) The decision not to offer the Petitioners these positions was based on their failure to pass the required tests establishing their qualifications to perform the General Mechanic job. (*Id.*) Both Caucasian employees and African-American employees who failed to pass the TABE, the written test and/or the hands-on test were deemed not qualified for General Mechanic positions. (*Id.*)

C. *The April 1997 Posting For Converting Mechanic Positions*

All eight of the qualified employees who were offered and accepted the July 1996 General Mechanic positions were already working as Converting Mechanics in the Mill's Maintenance Department. (Andrews Aff. ¶ 18, R. at 853; Woods Aff. ¶ 9, R. at 837.) Because of this, filling the July 1996 General Mechanic positions was going to result in openings for eight Converting Mechanics. Thus, an Hourly Job Posting form was posted in April 1997 seeking applicants to fill these soon-to-be vacant Converting Mechanic positions. (*Id.*) Petitioners each applied for the posted April 1997 Converting Mechanic positions. (*Id.*)

The selection criteria for the April 1997 Converting Mechanic positions was similar to that used for the July 1996 General Mechanic positions. (Andrews Aff. ¶ 19, R. at 852; Woods Aff. ¶ 10, R. at 837.) The April 1997 Converting Mechanic positions required: (1) certain minimal levels of background craft work education and craft work experience; (2) a score of at least 12.9 on the TABE; and (3) sufficient scores on the written craft test and hands-on test to prove that the applicant possessed appropriate knowledge and skill levels necessary to perform the Converting Mechanic job. (*Id.*) While each of the Petitioners met the education and experience requirements for the positions, once again neither

Petitioners Huggins nor Dillon passed the TABE, and neither of them attempted to retake the test — which they were permitted to do — to try to qualify for the Converting Mechanic positions, even though they knew they had to pass the TABE to qualify for the jobs. (Andrews Aff. ¶ 20, R. at 852; Woods Aff. ¶ 11, R. at 836; SUMF ¶¶ 13-14; Dillon Dep. 65-67, 138, 221-223, R. at 799-801, 792, 788-790; Huggins Dep. (Vol. I) 195-98 and (Vol. II) 140-47, R. at 782, 776-777.) Furthermore, all three of the Petitioners also failed to receive the minimum passing scores on the written craft test and the hands-on craft skills test. (Andrews Aff. ¶ 20, R. at 852; Woods Aff. ¶ 11, R. at 836.) Thus, Petitioners were not qualified for the Converting Mechanic positions. (*Id.*) Accordingly, when Georgia-Pacific completed its selection process for the April 1997 Converting Mechanic positions, the available positions were offered to qualified applicants who had passed the TABE, the written skills test, and the hands-on test. (*Id.*) The decision not to offer Petitioners these positions was based on their failure to pass the required tests establishing their qualifications to perform the Converting Mechanic job. (*Id.*) Both Caucasian employees and African-American employees who failed to pass the TABE, the written test and/or the hands-on test were deemed not qualified for the Converting Mechanic positions. (*Id.*)

D. *The December 1999 Posting For General Mechanic Positions*

In late 1999, the Mill again needed additional General Mechanics. (Andrews Aff. ¶ 21, R. at 851; Woods Aff. ¶ 12, R. at 836.) A General Mechanic Job Posting form was posted at the Mill in December 1999, and Petitioners each applied for the posted positions. *Id.* The requirements for selection as a General Mechanic again were: (1) certain minimal levels of background craft work education and craft work experience; (2) a passing score on the TABE; and (3) sufficient scores on the written craft test and hands-on craft test to prove that the applicant possessed appropriate

knowledge and skill levels in skilled crafts necessary to perform the General Mechanic job, including electrical and instrumentation skills, and the mechanical skills of pipefitting, millwrighting, and welding. (*Id.*)

While each of the Petitioners met the education and experience requirements for the December 1999 General Mechanic positions, once again neither Petitioners Huggins nor Dillon passed the TABE, and neither of them attempted to retake the test — which they were permitted to do — to try to qualify for the General Mechanic positions, even though they knew they had to pass the TABE to qualify for the jobs. Andrews Aff. ¶ 22, R. at 851; Woods Aff. ¶ 13, R. at 835; SUMF ¶¶ 13-14, R. at 876; Dillon Dep. 65-67, 138, 221-223, R. at 799-801, 792, 788-790; Huggins Dep. (Vol. I) 195-98 and (Vol. II) 140-47, R. at 782, 776-777.). Further, all three of the Petitioners also failed to receive the minimum passing scores on the written craft test and the hands-on craft skills test. (Andrews Aff. ¶ 22, R. at 851; Woods Aff. ¶ 13, R. at 835.) Thus, Petitioners were not qualified for the General Mechanic positions. (*Id.*) In addition, Petitioner Carmena voluntarily withdrew his name from consideration for the December 1999 General Mechanic positions before the final selection was made. (*Id.*) Accordingly, when Georgia-Pacific completed its selection process for the December 1999 General Mechanic positions, the available positions were offered to qualified applicants who had passed the TABE, the written skills test, and the hands-on test. (*Id.*) The decision not to offer the Petitioners these positions was based on their failure to pass the required tests establishing their qualifications to perform the General Mechanic job, and because, in Carmena's case, he had withdrawn himself from consideration for the positions. (*Id.*) Both Caucasian employees and African-American employees who failed to pass the TABE, the written test and/or the hands-on test were deemed not qualified for the positions. (*Id.*)

REASONS FOR DENYING THE PETITION

Without a single citation to the record, Petitioners ignore the fundamental, well-established employment laws which bar their claims and seek review by this Court based entirely on factual arguments. However, "a petition for a writ of certiorari is granted only for compelling reasons . . . [and] is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Further, as this Court has specifically noted, summary judgment may be affirmed on appeal on any grounds supported by the record. *See Smith v. Phillips*, 455 U.S. 209, 215 n.6, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); *Cabral v. Town of Youngsville*, 106 F.3d 101, 104 (5th Cir. 1997). In this case, Petitioners failed not only to submit any evidence whatsoever that would indicate that Georgia-Pacific discriminated against them on the basis of their race, they also failed to create any question of fact with regard to numerous procedural bars to their claims. Accordingly, the District Court's summary judgment was consistent with the well-established precedent of this Court, and the Petition should be denied. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 2552-54, 91 L. Ed. 2d 265, 274-75 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538, 551-552 (1986); *Wise v. E. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995).

I. Petitioners Failed To Offer Sufficient Evidence To Support Their Claims Of Disparate Treatment

A. *Petitioners Failed To Present A Prima Facie Case Of Employment Discrimination Regarding The Three Positions At Issue*

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), this Court set forth a system of burden shifting rules in discriminatory treatment cases which has been applied without exception by each of

the Circuits. The case at hand involves nothing more than a routine application of that framework to a record, which contains no evidence of discrimination.

It is well established that the first step in the burden shifting process requires Petitioners to offer evidence sufficient to establish a *prima facie* case of discrimination. *Id.*; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000). To establish this *prima facie* case of race discrimination, Petitioners must show: (1) they are members of a protected group; (2) they applied for the positions at issue and were qualified for these positions; (3) they were rejected for the positions; and (4) Georgia-Pacific either hired individuals outside the protected class or continued to seek applicants with the Petitioners' qualifications. *Id.*; *Scales v. Slater*, 181 F.3d 703, 708 (5th Cir. 1999); *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 (5th Cir. 1996); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1087 (5th Cir. 1994).

The undisputed record evidence demonstrates that Petitioners did not establish a *prima facie* case of discrimination because they were not qualified for the three Maintenance Department positions they sought. While Petitioners applied for the July 1996 General Mechanic positions, the April 1997 Converting Mechanic positions, and the December 1999 General Mechanic positions at the Mill, the uncontroverted record evidence shows that *they did not meet the minimal qualifications set by Georgia-Pacific for these jobs*. It is uncontested that Dillon and Huggins failed to receive the required passing score on the TABE, which was a prerequisite qualification for all three of the jobs. (Andrews Aff. ¶¶ 13, 20, 22, R. at 856, 852, 851; Woods Aff. ¶¶ 7, 11, 13, R. at 838, 836, 835; SUMF ¶¶ 13-14, R. at 876.) In fact, Dillon and Huggins admitted in their depositions that when the selection process was open for all three of these jobs, neither of them had passed the TABE, and neither of them even sought to retake the test after they

first failed it, which they were allowed to do. (Dillon Dep. 65-67, 138, 221-223, R. at 799-801, 792, 788-790; Huggins Dep. (Vol. I) 195-98 and (Vol. II) 140-47, R. at 782, 776-777.) Thus, Dillon and Huggins were not qualified for the three jobs.

Likewise, it is undisputed that none of the Petitioners achieved the required passing score on the written crafts test and the hands-on crafts skills test, which also were prerequisite qualifications for all three jobs. (Andrews Aff. ¶¶ 10, 14, 19-20, 21-22; R. at 856-857, 855, 851-52; Woods Aff. ¶¶ 4, 8, 10-13, R. at 839, 838, 835-37.) Thus, Petitioners *simply were not qualified* for any of the three Maintenance Department positions which they sought. (*Id.*) Indeed, Petitioners freely admit that they cannot perform the various tasks listed in the job postings as prerequisites for the jobs. (Carmena Dep. 238-241, R. at 808-810; Dillon Dep. 221, R. at 790; Huggins Dep. (Vol. II) 185-86, 258-262, R. at 774, 771.) Petitioners' failure to pass these tests establishes that they were not qualified for the positions and accordingly were properly not offered them. (Andrews Aff. ¶¶ 14, 20, 22; R. at 855, 852, 851, Woods Aff. ¶¶ 8, 11, 13, R. at 838, 835, 837.) Because the undisputed record evidence establishes that Plaintiffs were not qualified, they did not establish a *prima facie* case of race discrimination.

Petitioners have consistently asserted that the tests "have never been shown to assert any legitimate Georgia-Pacific business purpose." [2] (Pet'rs' Br. at 14.) However, such an

2. Petitioners further try to suggest some improper or discriminatory motive behind the establishment of the testing criteria for these jobs by asserting — *without any support* — that the criteria were set unilaterally by Georgia-Pacific. (*See* Pet'rs' Br. at 14.) This assertion is incorrect and unsupported by *any* record evidence. Pursuant to the CBA and general principles of labor law, Georgia-Pacific does not and cannot change terms and conditions of unionized employees' employment unilaterally. (Pet'rs' Dep. Exh. 14 at Art. I, (Cont'd)

argument contributes nothing to a cognizable claim of discrimination, and does not assist Petitioners in setting out their *prima facie* case. Indeed, it is well-settled that employment discrimination laws do not protect employees from personnel decisions with which they disagree, and they are not intended to transform courts into personnel managers. *See, e.g., Dorsey v. Pinnacle Automation, Inc.*, 278 F.3d 830, 836 (8th Cir. 2002); *Deines v. Texas Dept. of Protective and Regulatory Servs.*, 164 F.3d 277, 281 (5th Cir. 1999); *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989). Rather, employment discrimination laws only protect employees from decisions that are unlawfully motivated by the employees' status as members of protected classes. *Id.*; *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 (5th Cir. 1988). The employer, not the employee, determines the qualifications for a particular job. *See, e.g., Deines*, 164 F.3d at 281 (citing *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 372 (5th Cir. 1997). An employer may utilize whatever method it chooses to identify which applicants are qualified for a job as long as those methods are nondiscriminatory. *Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996); *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1525 (5th Cir. 1993); *Moore v. Southwestern Bell Telephone Co.*, 593 F.2d 607, 608 (5th Cir. 1979).

Employment discrimination laws do not allow Petitioners to establish that they are qualified merely because they say they are. No matter how steadfast their belief that they were qualified for the job openings, the undisputed fact remains

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(Cont'd)

§ 2). Thus, these job criteria, along with other changes affecting unionized employees' employment conditions, were negotiated with the Union before they were implemented. (*Id.*) Petitioners offered no evidence that any change was made unilaterally, and Petitioners, not Georgia-Pacific, bear the burden of proof on this and every other aspect of their discrimination claims. *St. Mary's Honor Center v. Hicks*, 509 U. S. 502, 113 S. Ct. 2742-48, 125 L. Ed. 2d 407 (1993).

that they did not meet the qualifications Georgia-Pacific had established for these positions. Petitioners failed to state a *prima facie* case of race discrimination as to any of the three positions at issue because they were not qualified for the jobs. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Scales v. Slater*, 181 F.3d 703, 711-712 (5th Cir. 1999). This well-settled principle of law simply does not merit review.

B. *Petitioners Offered No Evidence That Georgia-Pacific's Legitimate, Non-Discriminatory Reason For Not Offering Petitioners The Jobs At Issue Was A Pretext For Discrimination.*

Even if there were some novel factual issue or conflicting legal precedent meriting this Court's review of Petitioners' qualifications (which there is not), the Petition should nevertheless be denied because Petitioners failed to offer evidence to rebut the legitimate, non-discriminatory reason offered by Georgia-Pacific to explain why Petitioners were not offered the positions they sought. *Reeves*, 120 S. Ct. at 2106; *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 507 (5th Cir. 1994). Georgia-Pacific has shown that it did not offer the three positions to Petitioners because they did not pass the tests for these positions. (Andrews Aff. ¶¶ 14, 20 22; R. at 856, 852, 851; Woods Aff. ¶¶ 8, 11, 13, R. at 838, 836, 837.) This is a legitimate, non-discriminatory reason that satisfies Georgia-Pacific's responsibility under the burden-shifting analysis. (*Id.*)

Since Georgia-Pacific met its burden, Petitioners were left with the "ultimate burden" of offering sufficient evidence on which a factfinder could conclude that Georgia-Pacific "intentionally discriminated against" them. *Reeves*, 120 S. Ct. at 2106. Petitioners could have satisfied this ultimate burden by offering sufficient evidence showing that the legitimate reasons offered by Georgia-Pacific were not its true reasons, but were a pretext for discrimination. *Id.*

(citing *St. Mary's Honor Center*, 509 U.S. at 507-508. "It is not enough . . . to *dis*believe the employer; [there must be sufficient evidence upon which] the factfinder [can reasonably] *believe* the Petitioners' explanation of intentional discrimination." *Id.* at 2108 (emphasis in original). Thus, to have avoided summary judgment, Petitioners were required to present evidence that both (1) rebutted Georgia-Pacific's non-discriminatory reason; and (2) created an inference that race was a determinative factor in the challenged decisions. *Id.*; *Rhodes v. Guiberson Oil Tools Div.*, 75 F.3d 989, 994 (5th Cir. 1996). Petitioners offered no record evidence on either of these points.

Here, Petitioners offered no evidence to suggest that they were discriminated against or in any way treated differently due to their race or that the stated reason they did not get the jobs they sought — their lack of passing the qualification tests — was a pretext for discrimination. Georgia-Pacific chose job qualifications criteria that it reasonably decided were necessary for General Mechanic and Converting Mechanic positions. (Andrews Aff. ¶¶ 3-9, R. at 856-860.) These criteria were undisputedly *applied to all applicants, regardless of race*, and various employees of all races were deemed not qualified for the jobs at issue because of their failure to meet these criteria. (Andrews Aff. ¶¶ 14, 20, 22; R. at 855, 852, 851; Woods Aff. ¶¶ 8, 11, 13, R. at 838, 836, 835.) Only employees who satisfied the qualification criteria were offered the jobs Petitioners sought. (*Id.*) Petitioners even recognize that the selection process adversely affected non-African-Americans as well; Petitioners state that each of the required tests were unfair to *anyone* who did not pass them. (Dillon Dep. 63, 69, R. at 802, 798; Carmena Dep. 179-80, 222-23, R. at 815-16; 813-14; Huggins Dep. (Vol. I) 25, 37, R. at 784, 783.) This is not evidence of discrimination. This is just more evidence that Petitioners did not pass the qualification tests *all applicants* had to pass to be eligible for the jobs at issue. Because Petitioners failed to present

evidence that Georgia-Pacific's stated reason for its decisions was pretext for race discrimination, the lower courts' decisions were correct, and the Petition should be denied.

II. Petitioners Claims Of Breach Of Collective Bargaining Agreement Are Barred By The Labor Management Relations Act And Unsupported By Record Evidence.

A. *Petitioners' Claims Are Preempted and Barred By The Labor Management Relations Act.*

Petitioners bring their action as a race discrimination action under Title VII and § 1981 for intentional discrimination. The real gravamen of this action, however, is Petitioners' claim that Georgia-Pacific violated provisions of the collective bargaining agreement (CBA) that binds both the Company and the Union Locals that represent hourly employees (including Petitioners) at the Mill.[3] As such, this cause of action is preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-197, and accordingly must be dismissed as a matter of law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 213, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985); *Livadas v. Bradshaw*, 512 U.S. 107, 122-23, 114 S. Ct. 2068 (1994).

Petitioners clearly assert in their brief that "when the African-Americans began obtaining seniority, Georgia-Pacific unilaterally breached the CBA. This is circumstantial evidence of intentional discrimination." (Petitioners Br. at 18.) While these allegations have no merit, such assertions by Petitioners show that the actual purported legal basis for Petitioners' lawsuit is their claim that Georgia-Pacific violated provisions of the CBA. The LMRA, however,

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3. Petitioners state that "the Plaintiffs were denied the opportunity to present [the CBA]." (Pet'rs' Br. at 18.) This assertion, however, is absolutely false, as it cannot be disputed that the CBA was introduced into the record. (*See* Pet'rs' Dep. Exh. 14, R. at 746.)

governs the relationship between Georgia-Pacific and the local Union, of which Petitioners are members, and resolving their claims about violations of the CBA requires this Court to interpret the CBA. Petitioners repeatedly ask the Court to do so. However, the LMRA preempts such action and accordingly, preempts Petitioners' claims. Petitioners' proper remedy was to file a grievance asserting that Georgia-Pacific unilaterally modified the CBA and therefore breached the agreement. If the Union refused to pursue that grievance, Petitioners could then file an action under § 301. *Allis-Chalmers*, 471 U.S. at 213; *Livadas*, 512 U.S. at 122-23.

Indeed, Section 301 of the LMRA provides that the federal courts have jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act." 29 U.S.C. § 185. According to the well-settled precedent of this Court, when resolution of a claim is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract" or "inextricably intertwined" with the terms of a labor agreement, then the claim is entirely preempted by the LMRA. *Allis-Chalmers*, 471 U.S. at 220, 213.

Petitioners note without analysis or conclusion that a defense which "only tangentially" implicates a CBA does not preempt a claim. (Petitioner's Br. at 17.) Yet, resolving Petitioners' instant claims requires the interpretation of specific terms of the CBA between Georgia-Pacific and the United Paperworkers International Union. (*See* Petitioners' Dep. Exh. 14, R. at 746.) Article V of the CBA, entitled "Grievance Procedure," expressly governs the very same terms and conditions of employment about which Petitioners complain. As Petitioners have admitted, Article V requires that employees who believe their rights under the CBA have been violated must use the grievance procedure provided for in the CBA. (Dillon Dep. 235-236, R. at 152; Huggins Dep. (Vol. II) 225-227, R. at 772.) The CBA sets out a detailed

three-step grievance solution process leading to arbitration by the Union. (*See* Petitioners' Dep. Exh. 14, R. at 746.) Furthermore, regarding Petitioners' specific claims that they were denied three transfers to positions over employees with less seniority and that the minimal qualifications that were required for the positions were improper under the CBA, the CBA expressly governs the issues which these claims address. (*Id.*) Simply stated, Petitioners claim that they should have been awarded the positions at issue based on the terms of the CBA, and those terms expressly govern Petitioners' claims. Thus, by the undisputed facts and law cited above, Petitioners' lawsuit is preempted by the LMRA and the CBA governing the relationship between Georgia-Pacific and Petitioners' Union. This principle of law is neither novel nor disputed.[4]

B. *Georgia-Pacific Did Not Breach The Collective Bargaining Agreement By Failing To Award Positions To Petitioners*

Even assuming that Petitioners' claims of breach of the CBA are not preempted and barred (which they are), Petitioners have offered no evidence that Georgia-Pacific breached the CBA by failing to promote Petitioner. According to Petitioners, the jobs at issue should have been awarded strictly on Mill seniority and without regard to testing or other qualifications. (See Petitioners Br. at 29). Neither the law nor the CBA requires Georgia-Pacific to award the jobs to persons who in its reasoned judgment are not qualified. The CBA specifically states that Georgia-Pacific is entitled

4. Despite Petitioners' assertion to the contrary, there is no lack of continuity within Fifth Circuit opinions regarding LMRA preemption. Indeed, the principles set forth in *Allis-Chalmers* have been consistently applied throughout the Fifth Circuit and other Circuits as well. *See, e.g., Gore v. Trans World Airlines*, 210 F.3d 944, 950 (8th Cir. 2000); *Cramer v. Consolidated Freightways, Inc.*, 209 F.3d 1122 (9th Cir. 2000); *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441, 1452 (5th Cir. 1992).

to manage "its business, operations, and affairs." (*See* Petitioners' Deposition Exhibit 14 at Art. IV, § 3, R. at 746.) Moreover, it is well settled that an employer has the right to determine what is required to perform a job, and to identify those persons who are qualified. *See, e.g., Dorsey*, 278 F.3d at 836; *Evans*, 80 F.3d at 960; *Deines*, 164 F.3d at 281; *Frazier*, 980 F.2d at 1525; *Moore*, 593 F.2d at 608. It is undisputed that Georgia-Pacific needed to hire persons who had the skills necessary to maintain and repair highly technical, computer-based equipment. (Andrews Aff. ¶¶ 3-9, R. at 856-60.) Contrary to Petitioners' assertions, the law simply does not require Georgia-Pacific to pass up qualified persons and hire unqualified persons, based solely on race or seniority or any other criteria which Plaintiffs would have Georgia-Pacific use. *Deines*, 164 F.3d at 281. There is no novel or conflicting legal precedent in this regard, and the Petition should therefore be denied.

III. The District Court Properly Exercised Its Discretion By Refusing To Re-Open Discovery For An Additional Eight-month Period.

In an effort to manufacture error by the District Court, Petitioners argue that "the lower court inappropriately ruled that discovery was time-barred."[5] (Pet'rs' Br. at 19.) Petitioners' argument is entirely without merit, as the District Court properly exercised its discretion by refusing to re-open discovery during the final, dispositive stages of this action and by refusing to accommodate Petitioners' repeated attempts to engage in untimely discovery.

In January, 2001, Petitioners decided that they wanted to reopen the discovery period in this case for an additional

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5. A review of the District Court's decision regarding Petitioners' belated requests for discovery before granting summary judgment is limited to whether the District Court's decision was an abuse of discretion. *See, e.g., Solo Serve Corp. v. Westowne Assoc.*, 929 F.2d 160, 167 (5th Cir. 1991).

period of eight (8) months. (*See* Petitioners' Motion to Set Status Conference, R. at 376.) Quite reasonably, the District Court denied Petitioners' motion as untimely. Indeed, Petitioners' request came only after they already had over ten (10) months — from April 9, 1999 through February 15, 2000 — to conduct discovery in this case. (Amended Scheduling Order, R. at 97.) Moreover, Petitioners did not decide they wanted additional discovery until almost *a year after discovery had closed* and *seven (7) months after Petitioners' new counsel had entered her appearance* in this case. (*See* May 15, 2000 Entry of Appearance of Donna Grodner, R. at 170.)

It was Petitioners' burden under both Rule 16 of the Federal Rules of Civil Procedure and the scheduling orders entered by the District Court to show good cause for an extension of the discovery period. *See* Fed. R. Civ. P. 16(b) ("a schedule shall not be modified except upon a showing of good cause"); *Saavedra v. Murphy Oil USA*, 930 F.2d 1104, 1107 (5th Cir. 1991) (good cause requirement of scheduling order must be met). Petitioners did not show good cause because they could not offer a good reason for their egregious delay in seeking discovery. To the contrary, Petitioners argued to the District Court, as they have on appeal, that discovery should have been reopened simply because "[Petitioners'] previous attorneys took not one deposition and failed to follow up on their document requests." (Pet'rs' Br. at 19.) Clearly, Petitioners' own decision not to take depositions during the ten-month discovery period neither explains their delay in seeking discovery nor justified reopening the discovery period in such a belated fashion.[6]

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6. Petitioners argue that they should not be blamed for their delay in seeking discovery because "there was no dalliance" on the part of their current counsel. (Petitioners' Br. at 19.) However, it is well established that Petitioners may not escape the consequences of their delay by blaming the counsel whom they have chosen as

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The District Court's orders, discovery rulings, and deadlines have long been recognized as essential to a fair and impartial judicial process. *See Allen v. First Nat'l Bank of Atlanta*, 169 F.2d 221, 224 (5th Cir. 1948); *Harris v. Amoco Production Co.*, 768 F.2d 669, 684 (5th Cir. 1985). All litigants must meet the Court's deadlines and follow the Court's orders, and the District Court's application of this fundamental rule of law was not an abuse of its discretion and simply does not merit review by this Court.

IV. Petitioners Failed To Submit Any Evidence Which Would Support A Claim Of Disparate Impact.

Petitioners assert that the lower courts erred by failing to analyze Petitioners' claims "as a disparate impact case."[7] (Pet'rs' Br. at 21). Specifically, Petitioners argue that the qualification tests that they did not pass are discriminatory because they had a disparate impact on them as African-

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representatives. *Pioneer Investment Services Company, Petitioner v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 397, 113 S. Ct. 1489, 1499, 123 L. Ed. 2d 74 (1993)). Indeed, contrary to Petitioners' assertion that they were, "for all purposes" *pro se*, Petitioners were represented by counsel throughout the discovery period. (Pet'rs' Br. at 19; April 13, 2000 Order granting Mot. to Withdraw As Counsel, R. at 115.) Moreover, Petitioners' current counsel had been in this case *for seven (7) months* before untimely requesting that discovery be re-opened. Therefore, all of the fault for waiting so long after discovery closed to try to seek more discovery cannot be placed at the feet of Petitioners' previous counsel.

7. Petitioners' initial Complaint and Amended Complaint assert that they were treated differently and not offered jobs because of their race. As discussed in Part I of this brief, this is a claim for intentional discrimination based on a disparate treatment theory — one that fails in this instance. While Georgia-Pacific strongly contends that Petitioners have never properly asserted a disparate impact claim regarding any aspect of their employment, any such claim was properly dismissed because Petitioners failed to offer any evidence to support that claim.

Americans. However, it is a fundamental tenant of employment law that to state a legitimate "adverse impact" claim under Title VII, Petitioners are required to show that a specific, facially neutral employment practice or policy has a *statistically significant*, disproportionate negative impact which is not justified by legitimate business considerations.[8] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 655, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252 n.5, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Rivera v. City of Wichita Falls*, 665 F.2d 531, 545 (5th Cir. 1982); *see also Employment Discrimination Law*, 3rd Ed., B. Lindemann & P. Grossman, et al., at pp. 89-103. Because Petitioners failed to present any evidence of disparate impact, their assertion that the district court should have analyzed their claims under that theory is moot and does not deserve this Court's review.

Indeed, Petitioners specifically admit that they "were unable to show that Georgia-Pacific's [qualification testing] scheme . . . served no legitimate purpose." (Pet'rs' Br. at 20.) Moreover, despite Petitioners' arguments to the contrary, the record in this case contains *absolutely no relevant statistical evidence* showing any significant statistical disparity between workers of different races due to a specific employment practice or policy of Georgia-Pacific. Rather, Petitioners attempt to support their claims of discrimination with inapplicable and irrelevant numbers which have been repeatedly and universally rejected as a basis for proving

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8. Section 1981 requires a showing of *intentional* discrimination, and the disparate impact form of proof therefore does not apply to Petitioners claim under that statute. *See* 42 U.S.C. § 1981(a)(1) (disallowing disparate impact claims).

discrimination on the grounds that they are not statistically significant.[9]

Specifically, Petitioners' comparison of raw numbers of African-Americans and non-African-Americans who applied for and received each of the three positions at issue demonstrates absolutely nothing. Rather, the small samples used within Petitioners' comparison do not establish any disparate impact, and are directly at odds with the controlling precedent of every circuit. Petitioners argue that selecting one (1) of six (6) blacks tested and seven (7) of twenty-three (23) whites tested in connection with the 1996 posting does not meet a "4/5ths test" which they claim establishes discrimination. (Pet'rs' Br. at 9.) However, this "4/5ths test" has been roundly criticized, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995, 108 S. Ct. 2777, 2789, 101 L. Ed. 2d 827 (1988); *Clady v. County of Los Angeles*, 770 F.2d 1421, 1428 (9th Cir. 1985) (noting that the 4/5ths test "has been sharply criticized by courts and commentators"), and it is *absolutely meaningless* in cases such as this one where the sample size (the total raw numbers of successful job applicants versus total applicants) is too small to have any probative value. *See Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689, 693 (5th Cir. 1979). In fact, the group of only twenty-nine employees tested by Georgia-Pacific in 1996 and utilized within Petitioners' comparison is *even smaller* than samples routinely held to be too small to provide a reliable basis for statistical analysis under the "4/5 test." *See Black*

9. In fact, Petitioners note that the District Court had only one "concern" in rendering summary judgment in favor of Georgia-Pacific: that supposedly no African-Americans who applied for the three positions at issue could meet the qualifications. (Pet'rs' Br. at 13-14.) Yet, even that single concern is based on Petitioners' mischaracterization of the evidence, Petitioners *admit* that African-Americans *were awarded* some of the positions at issue. (*See* Pet'rs' Br. at 8, 11) (one African-American awarded position posted in 1996, one African-American awarded position posted in 2000, and one African-American transferred in 2000).

v. City of Akron, 831 F.2d 131, 134 (6th Cir. 1987) (sample size of 75 too small for application of the 4/5 test); *Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1451 (D.C. Cir. 1988) (samples of 11 and 70 too small); *Jones v. Pepsi-Cola Metro. Bottling Co.*, 871 F. Supp. 305 (E.D. Mich. 1994) (189 is too small).

Moreover, Petitioners failed to offer any testimony which shows that these raw numbers (regarding job applicants) are statistically significant — in other words, that these numbers cannot be the result of random chance.[10] *Employment Discrimination Law*, 3rd Ed. at 90-91. All relevant case law indicates that the raw numbers offered by Petitioners are useless without some probative evidence that shows that the numbers are statistically significant and which rules out the possibility that the end results of the decisions they illustrate result from random chance. *Id.*; *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (1977); *Rendon v. AT&T Technologies*, 883 F.2d 388, 398 (5th Cir. 1989). Accordingly, these raw numbers of job applicants to the 1996 position simply do not constitute any evidence of a racially disparate impact or of intentional

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10. Petitioners assert that "the trial court improperly made a credibility determination that Georgia-Pacific's two affidavits . . . were entitled to more credibility than an expert opinion . . ." (Pet'rs' Br. at 15.) Yet, Petitioners' attempts to include expert testimony in this case were untimely, as the District Court had already denied Petitioners previous untimely attempts to include purported expert testimony. In addition, a cursory review of Petitioners' proposed expert report shows that it fails to meet the criteria for expert testimony established by *Kumho Tire Co. v. Carmichael*, 526 U.S. 574, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Indeed, the report begins with the expert's recognition that *he did not have sufficient information to make a proper analysis of the job criteria at issue*, and then goes on for four pages to list sixteen (16) significant areas of information (many including multiple subparts) needed for a properly rendered opinion. Thus, the "expert" report is of no assistance whatsoever to a consideration of Petitioners' claims.

discrimination. As such, Petitioners' argument that the lower courts should have analyzed their claims under a disparate impact theory does not merit this Court's review.

V. Petitioners' Claims Are Procedurally Barred.

A. *Petitioners' Claims Of Discrimination With Respect To the July 1996 Positions Are Time-Barred Under Both Title VII and Section 1981.*

Petitioners' claims of discrimination with respect to the July 1996 posting are time-barred under both Title VII and § 1981.[11] Title VII requires that Petitioners file a complaint with the EEOC or state administrative agency within 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1); *see also*, *Delaware State College v. Ricks*, 449 U.S. 250, 256, 66 L. Ed. 2d 431, 438-39, 101 S. Ct. 498 (1980). Likewise, a one year limitations period for personal injury claims in Louisiana is applicable to Petitioners' claims of discrimination under § 1981. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987); La. Civ. Code. Art. 3492. Pursuant to the precedent of this Court, the applicable limitations periods for both Title VII and § 1981 claims begin to run from the time Petitioners knew or should have known that an adverse decision had been made. *Delaware State College*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 43 (1980); *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981); *Williams v. Conoco, Inc.*, 860 F.2d 1306, 1307 (5th Cir. 1988); *Clark v. Resistoflex Co.*, 854 F.2d 762, 765 (5th Cir. 1988) (cause of action accrues under § 1981 from the time an employee "knew or should have known" of the employer's decision).

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11. The procedural arguments presented in Section V, *supra*, were raised before both the lower courts. However, the District Court denied the Summary Judgment motion in which the arguments were presented, and the Fifth Circuit assumed *arguendo* that no procedural bars existed to Petitioner's claims.

Here, Petitioners filed EEOC charges on May 29, 1998 and filed their Complaint with the District Court on November 30, 1998. (Carmena Dep. 129-132, R. at 819-822; Dillon Dep. 81-82, R. at 796-797; Huggins Dep. (Vol. I) 202-204, R. at 781; Petitioners' Dep. Exs. 7, 18 and 27, R. at 761, 724, 712; SUMF ¶ 21-22, R. at 881; Andrews Aff. ¶ 23, R. at 850; Woods Aff. ¶ 14, R. at 834.) Thus, Petitioners' Title VII claims to the July 1996 positions are time barred if they knew that they were not awarded the positions more than 300 days before May 29, 1998 or, in other words, if they knew they were not selected before August 2, 1997. Likewise, Petitioners § 1981 claims to the July 1996 positions are time barred if they knew they were not awarded the positions more than a year before filing their Complaint or, in other words, if they knew they were not selected before November 30, 1997.

The undisputed facts of record clearly demonstrate that Petitioners each knew (or should have known) that they were not selected for the July 1996 positions long before either August 2, 1997 or November 30, 1997. Both Dillon and Huggins knew that a TABE score of at least 12.9 was required to qualify for the General Mechanic position, and both knew as early as September 1996 that they had not passed the test in their only attempt at doing so. (Dillon Dep. 65-69, R. at 798-801; Huggins Dep. Vol. I: 198, R. at 782.) Moreover, Carmena does not dispute that he received a September 11, 1997 memo notifying him that he was not selected for the General Mechanic position. (Carmena Dep. at 107, R. at 1054.) Finally, all three Petitioners specifically *complained to management* of discrimination in connection with the General Mechanic position by at least July of 1997. (Carmena Dep. 83-84, 91-92, R. at 156; Huggins Dep. Vol II: 135, R. at 156 & Petitioners' Dep. Ex. 15; Dillon Dep. 76-78, R. at 156.) Because Petitioners each knew they were not selected for the position posted in July 1996 long before the limitations period applicable to claims under Title VII and

§ 1981, their claims are time-barred according to the well-established precedent of all Circuits.

B. *Petitioners' Title VII Claims Regarding the April 1997 Converting Mechanic Positions and the December 1999 General Mechanic Positions Are Barred Because Petitioners Failed To Exhaust Administrative Remedies For These Claims.*

Exhaustion of administrative remedies is an absolute prerequisite to recovery under Title VII. *See, e.g., Brown v. General Services Admin.*, 425 U.S. 820, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976); *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1988). Because Petitioners failed to pursue remedies through the EEOC prior to filing a Title VII claim regarding either the 1997 Converting Mechanic positions or the 1999 General Mechanic positions, the District Court properly rendered summary judgment as to Petitioners' claims for those positions, and the Petition should be denied.

1. *April 1997 Converting Mechanic Positions*

Petitioners each filed two EEOC Charges alleging discrimination by Georgia-Pacific. Petitioners' claims of discrimination based on their not being offered the April 1997 Converting Mechanic positions *were not included in either* their first EEOC Charges filed in 1998, or their second EEOC Charges, filed in 2000. (Pet'rs' Dep. Exs. 7-8, 18-19, and 27-28; R. at 753-761; SUMF ¶ 21-22, R. at 881; Andrews Aff. ¶ 23 and Ex. A, R at 850 and 848; Woods Aff. ¶ 14 and Ex. A, R. at 834 and 832.) Title VII claims that are not contained in Petitioners' EEOC Charges cannot be added to the Petitioners' Title VII lawsuits emanating from those Charges. A court may only address those claims that were asserted in the EEOC Charges or which could reasonably be expected to grow out of the scope of the EEOC's investigation of the Charges. *Edelman v. Lynchburg College*, 122 S. Ct. 1145, 1148 n.2, 192 L. Ed. 2d 188 n.2 (2002) (quoting 29 C.F.R. § 1601-12(b) (1997)); *Strouss v. Mich. Dept. of*

Corr., 250 F.3d 336, 342 (6th Cir. 2001); *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990); *Young v. City of Houston*, 906 F.2d 177, 179 (5th Cir. 1990); *Vuyanich v. Republic National Bank of Dallas*, 723 F.2d 1195, 1198-1201 (5th Cir. 1984), *cert. denied*, 469 U.S. 1073, 105 S. Ct. 567, 83 L. Ed. 2d 507 (1984); Because Petitioners never filed an EEOC Charge regarding the April 1997 Converting Mechanic positions, they are barred from bringing Title VII claims for these positions.

2. *1999 General Mechanic Positions*

In the EEOC Charges Petitioners filed in 2000, they allege that Georgia-Pacific discriminated against them by not offering them General Mechanic positions posted in December 1999. (Andrews Aff. ¶ 23 and Ex. A, R. at 850 and 848; Woods Aff. ¶ 14 and Ex. A, R. at 834 and 832.) However, the EEOC investigations as to these Charges were still pending throughout Petitioners' suit in District Court, and Petitioners never introduced evidence that they had been issued Right to Sue Notices on the claims contained in these Charges. (*Id.*) Petitioners bear the burden of proof in this regard. *Jackson v. Seaboard Coastline R. Co.*, 678 F.2d 992 (11th Cir. 1982); *United Black Firefighters of Norfolk v. Hirst*, 604 F.2d 844 (4th Cir. 1979) Therefore, any Title VII claims covered by these Charges are not ripe for judicial consideration. 42 U.S.C. § 2000e-5(f)(1); *Pinkard v. Pullman Standard*, 678 F.2d 1211, 1218 (5th Cir. 1982).

CONCLUSION

This case presents no issue that merits this Court's attention or review, and the Petition should be denied.

Respectfully submitted,

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